Editor's note: This case has been expressly overruled to the extent it is construed to require a result different than that set out in Jacqueline Dilts, 145 IBLA 109 (1998).

ANDREW BALLUTA

IBLA 89-88 Decided January 3, 1992

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying a request of a Native allotment applicant to reopen and reinstate Native allotment application A-052571.

Vacated and remanded.

1. Alaska: Native Allotments--Rules of Practice: Appeals: Generally

> Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a) (1988), provides that all Native allotment applications which were pending before the Department on or before Dec. 18, 1971, are approved on the 180th day following the effective date of the Act, unless otherwise provided by other paragraphs or subsections of that section. An application is pending on or before Dec. 18, 1971, where the application is filed in 1960 and closed in 1966 for failure to provide any proof of use and occupancy, but the applicant is not notified by decision of the closure and the BLM field report discloses an issue of fact as to applicant's exclusive use or occupancy. Under such circumstances, BLM erred in rejecting an applicant's request that his Native allotment application be reinstated and either approved or adjudicated pursuant to sec. 905(a) of ANILCA.

APPEARANCES: Michael C. Roebuck, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Andrew Balluta has appealed from a decision, dated October 19, 1988, in which the Alaska State Office, Bureau of Land Management (BLM), denied his petition for reinstatement of Native allotment application A-052571.

On July 8, 1960, appellant filed an application for a Native allotment pursuant to the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed on December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), subject to applications pending before the Department on that date). The application described approximately 160 acres of land located on the north shore of

Lake Clark (secs. 9 and 16, T. 2 N., R. 29 W., Seward Meridian), but did not state when the applicant commenced occupancy of this land.

By notice dated November 17, 1960, BLM informed Balluta that the Bureau of Indian Affairs (BIA) had found him to be entitled to an allotment, that BLM had found his application to be in order, and that the selected lands were available for allotment. BLM also informed appellant, however, that in order to receive title to the lands, he must submit proof of substantially continuous use and occupancy of the lands for a period of 5 years, and that if he did not file such proof by July 7, 1966 (6 years from the date he filed his application), his application "will terminate without prejudice" to his filing a subsequent new application.

The record also contains undated correspondence to Balluta from BLM, stating that appellant's 6-year statutory period to file evidence of use
and occupancy would expire on July 7, 1966. This letter, which was returned to BLM marked "unclaimed" in 1966, warned that application A-052571 would be closed if Balluta did not take any action within the time allowed.

By notice dated October 12, 1966, BLM informed BIA that application A-052571 was being closed because the statutory life period had expired without evidence of occupancy having been filed. No indication appears
in the record that appellant was informed of this closure.

On March 5, 1982, Balluta requested that his allotment application be reinstated, and by decision dated October 19, 1988, BLM denied this request. In this request for reinstatement, counsel stated that this request was made pursuant to section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a) (1988), and also pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

In its October 19, 1988, decision, BLM concluded that the applicant
did not submit proof of his use and occupancy within the 6-year statutory period as required by 43 CFR 2561.2 1/ and concluded, therefore,
that Balluta's application was properly closed. Even if the application

1/ This regulation reads:

"(a) An allotment will not be made until the lands are surveyed by the Bureau of Land Management, and until the applicant or the authorized officer of the Bureau of Indian Affairs has made satisfactory proof of substantially continuous use and occupancy of the land for a period of five years by the applicant. Such proof shall be made on a form approved by the Director, Bureau of Land Management, and filed in the proper land office. If made by the applicant, it must be signed by him, but if he is unable to write his name, his mark or thumb print shall be impressed on the statement and witnessed by two persons. This proof may be submitted with the application for allotment if the applicant has then used and occupied the land for five years, or may be made at any time within six years after the filing of the application when the requirements have been met."

were reinstated as proposed, BLM stated, the application would have to be rejected for failure to file proof of use and occupancy. These reasons caused BLM to deny appellant's request for reinstatement of application A-052571.

In the statement of reasons on appeal (SOR) to the Board, counsel for appellant challenges BLM's having "closed the application for failure to provide further evidence of use and occupancy, apparently concluding that Mr. Balluta's proof of use and occupancy was insufficient" (SOR at 6). Counsel states that while Balluta was given the opportunity to provide further written evidence, he was "not given an opportunity for an oral hearing or to present witnesses. Nor was he provided with notice informing him why his evidence was deemed insufficient. These procedural deficiencies violated Mr. Balluta's due process rights as set forth in Pence," counsel urges (SOR at 6-7).

Balluta maintains that under Pence v. Kleppe, supra, "[t]he process that was due included notice of the specific reasons for the proposed rejection, opportunity to submit written evidence, and an opportunity for an oral hearing where evidence and testimony of favorable witnesses may be submitted" 2/ (SOR at 7). Counsel contends that "[t]he fact that additional written documentation describing use and occupancy was not timely submitted is irrelevant to the issue of whether the BLM granted the process that was due Mr. Balluta" (SOR at 8).

In addition, appellant maintains that reinstatement of his Native allotment application is mandated under section 905(a) of ANILCA, which provides as follows:

> Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) which were pending before the Department of the Interior on or before December 18, 1971 * * * are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise by paragraph (3), (4), (5), or (6) of this subsection * * *. [Emphasis added.]

Appellant offers the following interpretation of this statutory provision:

> All Native allotment applications which were pending before the Department on or before December 18, 1971, are to be approved or

2/ Appellant points out that in order to comply with the mandate of the Ninth Circuit Court of Appeals in Pence v. Kleppe, supra, the Department adopted the contest procedures found at 43 CFR 4.450 through 4.452, and that the Ninth Circuit subsequently found these procedures to facially comply with due process. Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978). Appellant complains that there was no issuance of a contest complaint (43 CFR 4.450-4, 4.451-2), no opportunity to answer (43 CFR 4.450-6), and no assignment of the case to an Administrative Law Judge to conduct a hearing (43 CFR 4.452).

> adjudicated. "The statutory approval implemented by Section 905 is intended to summarily approve allotments in all cases where no countervailing interest requires full adjudication." Olympic v. United States, 615 F. Supp. 990, 994 (D. Alaska 1985)(quoting S. Rep. No. 413, 96th Cong.,

> 2d Sess. 237-38, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5181-82. [This] application, filed in 1960, falls within the scope of section 905; it was pending before the Department of the Interior on or before December 18, 1971. It must, therefore, be processed accordingly. [Emphasis in original.]

(SOR at 9).

Appellant takes issue with BLM's position that only erroneously rejected applications were to be reinstated by section 905 regardless of when they were rejected. He refers to the legislative history of section 905, which explained:

> An amendment to Section 905 clarifies that the purview of the section includes all Alaska Native allotment applications which were pending before the Department of the Interior on "or before" December 18, 1971. The amendment clarifies that applications which were erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for hearing shall be approved or adjudicated by the Secretary pursuant to the terms of the section. [Emphasis added.]

(S. Rep. No. 413, 96th Cong., 1st Sess. 238 (1970), reprinted in 1980 U.S. Code Cong. & Admin. News 5182).

Appellant argues that an application filed and pending before December 18, 1971, even though BLM has rejected the application and closed the file before that date, must be reinstated and either approved or adjudicated pursuant to section 905. He reads section 905(a) to mean that BLM acted "erroneously" in rejecting an application without affording the applicant a hearing in compliance with Pence v. Kleppe, supra. He concludes that in section 905(a), "Congress was acknowledging the mandate in Pence v. Kleppe, where the Court found that applications rejected by the Secretary 'without an opportunity for a hearing,' violated the applicant's due process rights and were therefore erroneously rejected by the Secretary" (SOR at 11).

In its answer, BLM offers two reasons as to why appellant is not entitled to a hearing under section 905 of ANILCA and Pence v. Kleppe, supra. First, argues BLM, "ANILCA only requires the consideration of applications that were erroneously closed before December 18, 1971 * * *" (Answer at 8). Second, BLM asserts that "[t]he lack of any factual issue with respect to an applicant's failure to comply with the requirement of filing of proof of use and occupancy within six years after the date of application takes such a case outside the coverage of the Ninth Circuit's holding in Pence v. Kleppe." Id. Thus, BLM concludes that since the applicant failed to file

such proof within the prescribed 6-year period, his case was not "erroneously" closed, and ANILCA does not require its reconsideration.

[1] We look to the terms of section 905(a) of ANILCA for the resolution of this appeal. That section, quoted supra, provides with certain qualifications that a Native allotment application pending before the Department on or before December 18, 1971, shall be legislatively approved or adjudicated. If

adjudicated, the provisions of the Act of May 17, 1906, as amended, shall apply.

From the record, it is clear that Balluta's application was pending not only before December 18, 1971, but also well after that date. Although the record indicates that BLM regarded Balluta's application as closed for failure to provide evidence of use or occupancy within the 6-year statutory period, it does not appear that Balluta was ever informed of this fact. Indeed, the record suggests that BLM and appellant had no direct communications between early 1966 and 1982. It is also clear that BLM's field report on the allotment application, completed April 27, 1983, discloses some evidence of use by appellant. Recorded in the section of the report entitled "Land Use and Occupancy" are notes to the effect that the applicant's use of the land predated any withdrawal or State selection of the land. Also, evidence of use was observed, a man-made improvement in the form of a tent frame and some clearing were noted by the investigator. Additionally, the field report concludes that the applicant, who accompanied the BLM examiner, was knowledgeable about the area and further noted that nearby parcels belonged to the applicant's family members. The field report concluded that there may be some conflicts with other allotment applications, some of which involve the applicant's own "family members." This situation causes us to conclude that the applicant is entitled to have his application reinstated by BLM.

We do not find that BLM's November 17, 1960, letter to Balluta, which notified appellant that his application "will terminate" on or about July 7, 1966, absent receipt of proof of use and occupancy, may be read to remove the need for a subsequent decision rejecting application A-052571. 3/ We draw this conclusion based upon BLM's manner of handling other "statutory life" cases.

Thus, in the Heirs of Carl Takak, IBLA 88-135, we note that upon Takak's failure to file proof of use and occupancy during the 6-year statutory period provided by 43 CFR 2212.9-1(f), BLM issued a decision to Takak rejecting his allotment application F-023379. Similarly, in the Heirs of Silas Sockpealuk, IBLA 88-137, BLM again issued a decision when it rejected the Native allotment application of an individual who failed to provide evidence of use and occupancy during the 6-year statutory life. Finally, we note that in the Heirs of Saul Sockpealuk, IBLA 88-132, BLM closed

3/ A similar conclusion is reached upon considering BLM's undated correspondence advising that application A-052571 would be closed if Balluta failed to act before July 7, 1966.

Native allotment application F-022704 for failure to file proof of use and occupancy by issuing a decision addressed to Sockpealuk. 4/ See Heirs of Saul Sockpealuk, 115 IBLA 317 (1990).

This case is virtually identical to Michael Gloko, 116 IBLA 145 (1990), and we conclude, consistent therewith, that Balluta's Native allotment application was pending before the Department on or before December 18, 1971, and that reinstatement of this application was denied in error. See Michael Gloko, supra at 151. We direct BLM to reinstate this application and either approve or adjudicate it in accordance with section 905(a) of ANILCA. Michael Gloko, supra; Heirs of Saul Sockpealuk, supra; Frederick Howard, 67 IBLA 157 (1982).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is vacated, allotment application A-052571 is reinstated, and this case is remanded for further action consistent with this opinion.

Gail M. Frazier
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge

4/ The Takak application and each Sockpealuk application were filed in 1959, after the effective date of 43 CFR 67.5(f) (1961). Each of these applicants received a letter from BLM essentially similar to that issued by BLM to Balluta on Nov. 17, 1960.